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**Human Rights Council
Working Group on Arbitrary Detention**

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November – 4 December 2015

Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)

The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

The Government of Sweden replied to the communication of 16 September 2014 on 3 November 2014. The Government of the United Kingdom of Great Britain and Northern Ireland replied to the communication of 16 September 2014 on 13 November 2014. Sweden and the United Kingdom of Great Britain and Northern Ireland are parties to the International Covenant on Civil and Political Rights.

The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, that aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

Mr. Julian Assange, born on 3 July 1971, is an Australian national ordinarily residing in Sydney, Australia. He worked as a publisher and journalist prior to his arrest.

The source submitted that Mr. Assange has been detained since 7 December 2010, including 10 days in

isolation in London's Wandsworth prison; 550 days under house arrest, and thereafter detained in the Embassy of the Republic of Ecuador in London, United Kingdom. The source submitted that both the Governments of the United Kingdom of Great Britain and Northern Ireland and Sweden are the forces responsible for holding the detainee under custody.

The source informed that Mr. Assange applied for political asylum on 19 June 2012 and was granted asylum by the Republic of Ecuador on 16 August 2012. It was alleged that Sweden refused to recognize the political asylum granted to Mr. Assange. According to the source, Sweden insisted that Mr. Assange must have given up his right to political asylum and been extradited to Sweden, without any guarantee of *non-refoulement* to the United States where he faced, in its view, a well-founded risk of political persecution and cruel, inhumane and degrading treatment.

The source informed that Sweden issued a European Arrest Warrant against Mr. Assange for the purpose of obtaining his presence in Sweden for questioning in relation to a claimed investigation. No decision has yet been made as to whether there will be a prosecution and the investigation remains at the 'preliminary investigation' phase. Mr. Assange has not been charged with any crime in Sweden. Consequently, the source argued, Mr. Assange did not have the formal rights of a defendant, such as access to potentially exculpatory material.

On July 16, 2014, the Stockholm District Court upheld an arrest warrant for his questioning. The district court refused to acknowledge that Mr. Assange had been under a deprivation of liberty during his house arrest and during the time he had spent at the embassy. The district court only considered that he had been detained for the 10 days he was held in Wandsworth prison (7-16 December 2010). The district court had refused to acknowledge Mr. Assange's right to asylum.

The source submitted that during the period of his detention, Mr. Assange had been deprived of a number of his fundamental liberties. It argued that each aspect of the following circumstances has contributed an arbitrary element whose consequence had been or had become arbitrary detention. The key elements are:

- i. Inability of Mr. Assange to access the full-intended benefit of the grant of asylum by the Republic of Ecuador in August 2012;
- ii. The continuing and disproportionate denial to him of such access over a period of time in which its impact had become cumulatively harsh and disproportionate;
0. iii. The origins of the justification relied upon for his arrest to be pursued by Sweden under a European Arrest Warrant, and the way in which that request was validated and pursued with continuing effect to the present time.

The source emphasized that Mr. Assange's detention was not by choice: Mr. Assange had an inalienable right to security, and to be free from the risk of persecution, inhumane treatment, and physical harm. The Republic of Ecuador granted Mr. Assange political asylum in August 2012, recognizing that he would face those well-founded risks if he were extradited to the United States. The only protection he had from that risk at the time was to stay in the confines of the Embassy; the only way for Mr. Assange to enjoy his right to asylum was to be in detention.

The source highlights that the Working Group on Arbitrary Detention had agreed in previous cases that a deprivation of liberty exists where someone is forced to choose between either confinement, or forfeiting a fundamental right – such as asylum – and thereby facing a well-founded risk of persecution. In its view, the European Court of Human Rights and the United Nations High Commissioner of Refugees similarly adhere to this principle.

The source submits that Mr. Assange was deprived of his liberty against his will and his liberty had been severely restricted, against his volition. An individual cannot be compelled to renounce an inalienable right, nor can they be required to expose themselves to the risk of significant harm. Mr. Assange's exit from the Ecuadorian Embassy would require him to renounce his right to asylum and expose himself to the very persecution and risk of physical and mental mistreatment that his grant of asylum was intended to address. His continued presence in the Embassy cannot, therefore, be characterised as 'volitional'.

The source argues that Mr. Assange's detention is arbitrary, and falls under Categories I, II, III and IV as classified by the Working Group. In particular, the context of his deprivation of liberty has arisen from the failure of Sweden which initiated a process against him to obtain his extradition, in the face of contradictory wishes expressed by "complainants", having not established a prima facie case, and refusing, unreasonably and disproportionately, to achieve a process of questioning of him, if desired, through the normal processes of mutual assistance. Further, by his offer of co-operation in facilitating a number of alternative methods short of being extradited to Sweden – where it is further stated as a matter

of record, that he will then be imprisoned in Sweden on arrival and as a foreigner with no ties to Sweden, in custody until trial. Further, Mr. Assange is under constant surveillance and the conditions in which he of necessity remains do not adhere to the minimum rules for detainees.

The source submits that Mr. Assange has been deprived of fundamental liberties against his will and the deprivation of Mr. Assange's liberty is arbitrary and illegal. The arbitrary nature of Mr. Assange's confinement in the Embassy of Ecuador in London is grounded in the following factors:

Sweden is obliged by applicable law and Convention obligations to recognise the asylum granted to Mr. Assange, and no exceptions apply (Categories II and IV). Mr. Assange faces a serious risk of *refoulement* to the United States. The right to asylum and the related protection against *refoulement* is recognised under customary international law.

The disproportionate nature of the actions taken by the Swedish prosecutor, including the insistence upon the issuing of a European Arrest Warrant rather than pursuing questions with Mr. Assange in the United Kingdom as provided for by mutual assistance protocols (Categories I and III). For over two years, the Prosecutor has refused to consider alternative mechanisms, which would allow Mr. Assange to be interviewed in a manner, which was compatible with his right to asylum. The disproportionality of the Prosecutor's decision is also aggravated by her failure to take into consideration Mr. Assange's fundamental right to asylum, especially in the context of the refusal of the Swedish authorities to provide assurances regarding *non-refoulement*.

The Prosecutor has alternative mechanisms to secure information from Mr. Assange. If Mr. Assange leaves the confines of the Embassy, he forfeits his most effective and potentially only protection against *refoulement* to United States of America. Any hypothetical investigative inconveniences regarding the interview of Mr. Assange by video link or in the Embassy pale into insignificance when compared to the grave risk that *refoulement* poses to Mr. Assange's physical and mental integrity. Since the preliminary investigation has not progressed since 2010, it has not been completed in violation of Mr. Assange's right to a speedy resolution of the allegations against him, as per Article 14 (1) of the International Covenant on Civil and Political Rights.

By virtue of the fact that Mr. Assange has been denied the opportunity to provide a statement, which is a fundamental aspect of the *audi alteram partem* principle, and access to exculpatory evidence, Mr. Assange has also been denied the opportunity to defend himself against the allegations. The Prosecutor is also fully aware that the practical consequence of this decision is that Mr. Assange is compelled to remain in the confinement of the Ecuadorian Embassy. This failure to consider alternative remedies has therefore consigned Mr. Assange to a lengthy pre-trial detention, which greatly exceeds any acceptable length for an uncharged person. The duration of such detention is *ipso facto* incompatible with the presumption of innocence.

Since both the Swedish Prosecutor and the Stockholm District Court have refused to consider Mr. Assange's confinement under either house arrest or in the Embassy as a form of detention, he has been denied the right to contest the continued necessity and proportionality of the arrest warrant in light of the length of this detention, i.e. his confinement in the Ecuadorian Embassy. According to the source, Mr. Assange is effectively serving a sentence for a crime for which he has not even been charged. The Swedish authorities have nonetheless refused to acknowledge that this confinement should be taken into consideration for the purposes of calculating sentence if Mr. Assange were to be convicted of any crime. His continued confinement therefore exposes him to a likely violation of *nemo debet bis vexari pro una et eadem causa*; if convicted in Sweden, he will be forced to serve a further sentence in relation to conduct for which he has already been detained. This is contrary to Article 14 (7) of the ICCPR.

Indefinite nature of this detention, and the absence of an effective form of judicial review or remedy concerning the prolonged confinement and the extremely intrusive surveillance, to which Mr. Assange has been subjected (Categories I, III and IV): Sweden has refused to recognise Mr. Assange's confinement as a form of detention, and as such he has had no means to seek judicial review as concerns the length and necessity of such confinement in the Embassy. Mr. Assange has been continuously subjected to highly invasive surveillance for the last four years. He has never been disclosed the legal basis for such particular surveillance measures, and in fact has little ability to do so as the United States national security investigation against him is still underway. He has thus been deprived of the ability to contest their necessity or proportionality. The prospect of indefinite confinement is, in itself, is a violation of the requirement set out by the Human Rights Committee that a maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released.

Absence of minimum conditions accepted for prolonged detention of this nature (such as medical treatment and access to outside areas) (Category III): the Embassy of the Republic of Ecuador in London is not a house or detention centre equipped for prolonged pre-trial detention and lacks appropriate and necessary medical equipment or facilities. If Mr. Assange's health were to deteriorate or if he were to have anything more than a superficial illness, his life would be seriously at risk.

Response from the Governments

In the communications addressed to the Government of Sweden and the Government of the United Kingdom of Great Britain on 16 September 2014, the Working Group transmitted the allegations made by the source. The Working Group stated that it would appreciate if the Governments could, in their reply, provide it with detailed information about the current situation of Mr. Assange and clarify the legal provisions justifying his continued detention. The Government of Sweden replied to the communication of 16 September 2014 on 3 November 2014. The Government of the United Kingdom of Great Britain replied to the communication of 16 September 2014 on 13 November 2014.

According to the Government of Sweden, on 18 November 2010, a Swedish prosecutor requested that Mr. Assange should be detained in his absence on probable cause suspected of rape, two counts of sexual molestation and unlawful coercion. On the same day, the Stockholm District Court decided to detain Mr. Assange in his absence. The decision was upheld by the Svea Court of Appeal on 24 November 2010. In order to execute the detention order, the Swedish prosecutor issued an international arrest warrant as well as a European Arrest Warrant (Council Framework Decision, 2002/584/JHA, hereinafter referred to as the "EAW").

As understood by the Government of Sweden, in February 2011, the City of Westminster Magistrates' Court ruled that Mr. Assange should be surrendered to Sweden in accordance with the EAW. This decision was upheld by the High Court in a ruling of 2 November 2011 and by the Supreme Court on 30 May 2012. As a result of the EAW, Mr. Assange was apprehended in the United Kingdom and was detained there between 7 and 16 December 2010. He was thereafter subject to certain restrictions, such as house arrest. On 16 August 2012, Mr. Assange was granted asylum by the Republic of Ecuador and he has since June 2012 resided at the Ecuadorian Embassy in London.

Mr. Assange requested a reconsideration of the detention order before the Stockholm District Court on 24 June 2014. On 16 July 2014, the Stockholm District Court ruled that the decision on detention in absentia should be upheld. Mr. Assange had appealed the decision to the Svea Court of Appeal and a decision on the matter was still pending.

According to the source, Sweden insisted that Mr. Assange must give up his right to political asylum and be extradited to Sweden, without any guarantee of *non-refoulement* to the United States. According to the source, Mr. Assange faces a well-founded risk of political persecution and cruel, inhumane and degrading treatment. In this respect, the Government would like to submit the following.

In its reply, the Government of Sweden emphasized that it is important that all countries act in accordance with international human rights standards, including their treaty obligations.

The Government firstly found it pertinent to clarify the difference between the procedures pertaining to an EAW and the question concerning a guarantee of *non-refoulement* or extradition to a third state. The surrendering of persons within the European Union is based on EU-law and the common area for justice and the principle of mutual recognition of judicial decisions and judgements. The EAW applies throughout the EU and it provides improved and simplified judicial procedures designed to surrender people for the purpose of conducting *inter alia* a criminal prosecution. In the current case, an EAW has been issued by a Swedish prosecutor due to the fact that Mr. Assange is suspected of serious crime in Sweden and has been detained in his absence for those crimes.

The procedures pertaining to extradition is based on multilateral and bilateral treaties as well as on Swedish law, i.e. the Act on Extradition (1957:668). According to the Act, extradition may not be granted unless the criminal act is punishable in Sweden and corresponds to an offence for which imprisonment for one year or more is prescribed by Swedish law. If there is a risk of persecution, or, under certain conditions, if the offense is considered to be a military offense or a political offense, extradition may not be granted. Furthermore, an extradited person may not have the death penalty imposed for the offence. A decision on extradition is taken by the Government, after an investigation and opinion by the Prosecutor General's Office and, in case the person sought does not consent to extradition, a subsequent decision by the Swedish Supreme Court. Should the Supreme Court find that there are any obstacles to extradition, the Government is bound by this decision.

The Government of Sweden found it was important to emphasise that, to this date, no request for extradition regarding Mr. Assange has been directed to Sweden. Any discussion about an extradition of Mr. Assange to a third state is therefore strictly hypothetical. Furthermore, as has been explained above, any potential decision for extradition must be preceded by a thorough and careful examination of all the circumstances of the particular case. Such an examination cannot be made before a state has requested extradition of a specific person and specified the reasons invoked in support of the request. In addition, if a person has been surrendered to Sweden pursuant to an EAW, Sweden must obtain the consent of the surrendering state, in this case the United Kingdom, before being able to extradite the person sought to a third country. In light of the above, the Government refutes the submission made by the source that Mr. Assange faces a risk of refoulement to the United States.

In any case, the Government holds that the Swedish extradition and EAW procedures, contain sufficient safeguards against any potential extradition in violation of international human rights agreements.

In relation to the submission by the source that Sweden is obliged by applicable law and Convention obligations to recognise the diplomatic asylum granted to Mr. Assange by the authorities of the Republic of Ecuador, the Government submitted the following.

Regrettably, the source does not specify which law and Convention obligations Sweden is obliged to recognize. However, in the Government's opinion, general international law does not recognize a right of diplomatic asylum as implied by the source. The International Court of Justice has confirmed this fundamental position. The Government would also like to emphasise that the Latin American Convention on Diplomatic Asylum does not constitute general international law. On the contrary, it is a regional instrument and no similar instruments or practices exist elsewhere. Accordingly, the Government does not find itself bound by the aforementioned regulations.

It should furthermore be noted that according to relevant international instruments, including the Latin American Convention on Diplomatic Asylum, the right to seek and enjoy asylum does not apply if an applicant as ground of asylum invokes that he or she is wanted for ordinary, non-political, crime (see e.g. Article 14 of the Universal Declaration of Human Rights). In this respect, the Government notes that Mr. Assange is suspected of rape, sexual molestation and unlawful coercion, all non-political crimes, and can therefore not rely on the above legal frameworks in this respect.

In light of the above, the Government refutes the source's allegation that Sweden is obliged by applicable law and Convention obligations to recognise the asylum granted.

The source further alleges that Mr. Assange's detention is arbitrary, and falls under Categories I, II, III and IV as classified by the Working Group. In this regard, the Government of Sweden firstly noted that the source has not explained how the situation of Mr. Assange corresponds to the above-mentioned criteria adopted by the Working Group on Arbitrary Detention. For example, the Government noted that, except for the source's mentioning of Article 14 of the International Covenant on Civil and Political Rights, it is unclear under which other relevant international legal framework, if any, Mr. Assange is invoking his rights.

In any case, the Government contests that Mr. Assange is being deprived of his liberty in violation of the criteria adopted by the Working Group and that, accordingly, the Minimum Rules for the Treatment of Prisoners would apply to his situation. In this regard, the Government notes that Mr. Assange, voluntarily, has chosen to reside at the Ecuadorian Embassy. Mr. Assange is free to leave the Embassy at any point and Swedish authorities have no control over his decision to stay at the Embassy. Mr. Assange can therefore not be regarded as being deprived of his liberty due to any decision or action taken by the Swedish authorities. In this respect, the Government specifically notes that there is no causal link between Mr. Assange's current situation at the Ecuadorian Embassy and the EAW issued by the Swedish authorities, cf. Opinion No. 9/2008 (Yemen), and Opinion No. 30/2012 (Islamic Republic of Iran). The Government holds that Mr. Assange is free to leave the Ecuadorian Embassy at any point in time.

In relation to the submission that Mr. Assange does not have the formal rights of a defendant during the Swedish preliminary investigation, such as access to potentially exculpatory material, the Government submitted the following.

In Sweden, a Swedish authority, usually a prosecutor or a police officer, is responsible for conducting a preliminary investigation. The purpose of the preliminary investigation is to produce all the evidence in favour of, or against, a crime and a particular suspect. During a preliminary investigation, a suspect is entitled to examine all the investigation material upon which the allegation is based, and to request the police to carry out further investigations, such as questioning witnesses. The prosecutor is not allowed to

issue an indictment unless the suspect has declared that no further actions or measures are required in the preliminary investigation.

It may be added that since 1995, the European Convention on Human Rights, as well as the Additional Protocols ratified by Sweden, form part of Swedish law. Article 6 of the Convention is therefore an integrated part of Swedish legislation. Hence, the Swedish legislation regarding the criminal procedure, including the preliminary investigations, meets the requirements of the Convention. In light of the above, the submission that Mr. Assange does not have the formal rights of a defendant lacks merit.

As regards the submission that Mr. Assange's deprivation of liberty has arisen from Sweden's failure in refusing to consider alternative mechanisms and to question him through the procedures of mutual legal assistance, the Government holds the following.

To begin with, according to the Swedish Instrument of Government (1974:152) the Swedish Government may not interfere in an ongoing case handled by a Swedish public authority. Swedish authorities, including the Office of the Prosecutor and the courts, are thus independent and separated from the Government. In the case at hand, the Swedish prosecutor in charge of the preliminary investigation has determined that Mr. Assange's personal presence is necessary for the investigation of the crimes of which he is suspected. The prosecutor has the best knowledge of the ongoing criminal investigation and is therefore best placed to determine the specific actions needed during the preliminary investigation. In relation to suspicions of serious crime, such as the ones at hand, the interests of the victims are an important aspect of the considerations made by the prosecutor.

As regards Mr. Assange's potential detention in Sweden, the Government would like to clarify that as soon as Mr. Assange is in Sweden, the prosecutor must notify the district court. A new hearing will then be held before the court, where Mr. Assange attends personally. Thus, it is always for the district court to decide upon the issue of whether Mr. Assange should be detained or released.

The source also submits that the Stockholm District Court in its decision on detention on 16 July 2014 refused to acknowledge Mr. Assange's right to asylum. In this respect, the Government may clarify the following.

In its decision on 16 July 2014 (case No. B 12885-10), the Stockholm District Court ruled exclusively on the matter of whether Mr. Assange should continue to be detained in his absence. Essentially, the District Court stated the following. As a result of the EAW, Mr. Assange has been detained in the period between 7 to 16 December 2010 and he has thereafter been subject to various restrictions. These have, without being equated with a deprivation of liberty, of course, been very tough for Mr. Assange. The fact that Mr. Assange chooses to remain in the Ecuadorian embassy in the United Kingdom is, in the court's opinion, not to be considered as a deprivation of liberty and should therefore not be regarded as a consequence of the decision to detain him in his absence. The District Court further stated that it does not seem to be possible to surrender Mr. Assange at present, as he is residing at an embassy, but that this is not sufficient reason to rescind the order for his detention. However, the District Court makes no reference to Mr. Assange's potential right to asylum, as suggested by the source.

In sum, and with reference to what has been stated above and in response to the invitation of the Working Group, the Government holds that Mr. Assange does not face a risk of *refoulement* contrary to international human rights obligations to the United States; that Sweden is not obliged by applicable law and Convention obligations to recognise the diplomatic asylum granted to Mr. Assange; that Mr. Assange is currently not deprived of his liberty in violation of the criteria adopted by the Working Group; and that international law as well as other treaty obligations are being complied with by the Swedish authorities when handling the criminal investigation related to Mr. Assange.

According to the Government of the United Kingdom of Great Britain, Mr. Assange entered the Ecuadorean Embassy in London of his own free will on 19 June 2012. He has therefore been there for over two years. He is free to leave at any point.

The Ecuadorean Government granted Mr. Assange 'diplomatic' asylum under the 1954 Caracas Convention, not 'political' asylum. The UK is not a party to the Caracas Convention and does not recognise 'diplomatic' asylum. Therefore the UK is under no legal obligations arising from Ecuador's decision.

The UK Government considers that the use of the Ecuadorean Embassy premises to enable Mr. Assange to avoid arrest is incompatible with the Vienna Convention on Diplomatic Relations. Mr. Assange is wanted for interview in Sweden in connection with allegations of serious sexual offences. He is subject to a European Arrest Warrant in relation to these allegations. The UK has a legal obligation to extradite him

to Sweden.

The British Government takes violence against women extremely seriously and co-operates with European and other partners in ensuring that justice is done.

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Comments from the source

On 14 November 2014, the source submitted its comments to the responses of the Government of Sweden.

According to the source, the Government of Sweden and the Government of the United Kingdom of Great Britain have continued Mr. Assange's unjust, unreasonable, unnecessary and disproportionate confinement. Over time, the basis for Mr. Assange's confinement has become so disproportionate as to have become arbitrary. Since 18 November 2010, when a court ordered a domestic arrest warrant, which a Swedish prosecutor transformed into an international arrest warrant (EAW and Interpol Red Notice) in December 2010, without judicial oversight, Mr. Assange has still not been charged.

Since his arrest in London on 7 December 2010 at the request of Sweden, Mr. Assange has suffered various forms of deprivation of liberty, including confinement to the Ecuadorian Embassy from June 2012. Police continued to surround the embassy, continued to obstruct his asylum and continued their attempts to surveil his visitors and activities both physically and electronically.

On 29 October 2014, in response to an invitation by the United Kingdom, and prior to Sweden's response, the Swedish prosecutor again refused to move the case forward by questioning Mr. Assange. His chances of an "independent, rigorous and fair process" had already been significantly undermined, because, notwithstanding his right to benefit from the presumption of innocence, Mr. Assange had been deprived of his liberty for more than the applicable maximum sentence that would apply to the Swedish allegations.

The source considered that the transmitted response clearly has set out the Swedish Government's position, that it would do nothing to stop Mr. Assange's indefinite detention despite the passage of time and its consequent impact upon Mr. Assange.

The source emphasized that in its response, the Swedish Government conceded that Mr. Assange's situation, caused by Sweden, was "very tough", yet failed to address a single legal authority cited by Mr. Assange demonstrating that he was deprived of liberty and that this deprivation was arbitrary. In particular, the legal authorities cited in Mr. Assange's submission showed that an arbitrary deprivation of liberty arises, where a state forces an individual to 'choose' between confinement and risking persecution, confinement and the ability to apply for asylum, indefinite confinement and deportation and several other circumstances where an individual feels compelled to 'choose' to suffer indefinite confinement. The Government of Sweden had no reply to these authorities.

The source further underlined that in its response, the Swedish Government refused to consider the grounds for Mr. Assange's asylum under the 1951 Refugee Convention, customary international law or any other mechanism that was derivative of the *jus cogens* norm of *non-refoulement*. The Government of Sweden's reply was silent on the 1951 Refugee Convention Framework and failed to recognise that it had obligations in relation to the factual circumstances that gave rise to Mr. Assange's asylum. Sweden's failure to recognise humanitarian grounds for asylum contradicted state practice, including Sweden's own practice.

The source stated that the Government of Sweden sets out its political position in relation to Mr. Assange's asylum "the Government refutes the source's allegation that Sweden is obliged [...] to recognise the asylum granted". The reply did not devote a single word to the position set out in the Assange's submission concerning Sweden's duty to afford mutual recognition to asylum decisions issued by other States within the Framework of the 1951 Convention. The source asserted that Sweden's obligations arise, inter alia, under the 1951 Convention itself, to which it is a signatory; and Article 18 of the EU Charter. An examination of the grounds for Ecuador's decision, including the *jus cogens* norm of *non-refoulement*, is also absent from Sweden's Reply.

According to the source, as affirmed by UNHCR, States do not grant refugee status to persons; their decisions are declaratory in the sense that they simply 'recognise' that there are well-founded grounds to consider that the person is a refugee. In this sense, the point is not merely whether Sweden is obliged to recognise Ecuador's asylum decisions, but whether Sweden can ignore the fact that there has been an elaborate evidential determination that Mr. Assange faces a risk of persecution and cruel, inhuman and degrading treatment.

UNHCR has further confirmed that “the principle of *non-refoulement* applies not only to recognised refugees, but also to those who have not had their status formally declared”. Accordingly, the possibility that Sweden’s position is not to recognise the ‘diplomatic portion’ of Ecuador’s asylum decision does not exempt it from either (a) recognising Ecuador’s asylum assessment of Mr. Assange as a ‘refugee’ under the 1951 Refugee Convention or (b) its independent obligation to ensure that its domestic decisions do not ignore the evidential presumption that Mr. Assange requires protection from the risk of *refoulement* to the United States.

With regard to the narrow exclusion clause invoked by Sweden in its response, the source claimed that the Government misunderstood both the clause and the grounds for Mr. Assange’s asylum. In particular, the statement of the Swedish Government in its response that “the right to seek and enjoy asylum does not apply if an applicant as grounds of asylum invokes that he or she is wanted for ordinary, non-political, crime (see e.g. Article 14 of the Universal Declaration of Human Rights).” The exclusion clause, as applied by Sweden’s response, misconstrues the grounds for Mr. Assange’s asylum.

The grounds for Mr. Assange’s asylum have grown stronger over time. On 19 May this year [2015] the United States stated in its court submissions that the investigation against Mr. Assange is an “ongoing Department of Justice (“DOJ”) and FBI criminal investigation and pending future prosecution” and that the United States Government has been “very clear that main, multi-subject, criminal investigation of the DOJ and FBI remains open and pending.”

The source emphasized that notwithstanding that the United States continued to build its case against Mr. Assange while he was trapped in the Embassy and could at any moment file an extradition request of its own; formally, had Sweden not issued a European Arrest Warrant for Mr. Assange, he would not have presently faced arrest upon departure from the Ecuadorian Embassy, nor would he have been subjected to the current intrusive regime of surveillance and controls. Thus, his deprivation of liberty was governed by Sweden’s maintenance of its extradition warrant and therefore falls under the authority of Sweden.

In connection to this the source affirmed that the EAW issued by Sweden is the current formal basis for Mr. Assange’s detention, although United Kingdom police have been instructed to arrest Mr. Assange even if the Swedish EAW falls away. In this regard, Mr. Assange continues to face arrest and detention for breaching his house arrest conditions (“bail conditions”) as a result of successfully exercising his right to seek asylum. However the conditions of his house arrest arise directly out of Sweden’s issuance of the EAW.

The source also asserted that the response of the Government of Sweden failed to acknowledge Sweden’s own practice of affording diplomatic asylum. In particular, in its response the Government of Sweden stated that no practices exist in general international law to support the institution of diplomatic asylum. Sweden’s position was incongruous with the fact that Sweden had itself recognised that States have, under general international law, a right and a duty in certain cases to provide diplomatic asylum on humanitarian grounds.

The source claimed that Sweden could not resile from its own practice simply because it was responding to Mr. Assange’s complaint; the principle of estoppel means in international law that States are bound by their representation and by their conduct.

According to the source, Sweden has long recognised humanitarian diplomatic asylum as being a part of general international law. Particularly famous is the practice of Swedish diplomatic agents, most prominently Raoul Wallenberg in Budapest who during several months in 1944, gave diplomatic asylum in the Swedish Embassy, but also in billeted abutting buildings, to thousands of Jewish Hungarians and other persons as part of a then secret agreement between the United States and Sweden. In Santiago in 1973, the Swedish Ambassador to Chile, Harald Edelstam, gave numerous Chileans and other nationals sought by the authorities of Augusto Pinochet not only diplomatic asylum in the Swedish Embassy, but also safe conduct to Sweden. Sweden also granted temporary diplomatic asylum to a US national in Tehran during the so-called Iran hostage crisis, as did Canada and the United Kingdom.

In its comments the source, stated that Sweden not only misrepresented the grounds for Mr. Assange’s asylum, it also failed to address the fact that Mr. Assange applied for and obtained asylum in relation to the actions against him by the United States of America and the risk of political persecution and cruel, inhuman and degrading treatment.

With regard to the legality of the EAW, the source stressed that since the final decision by the Supreme Court of the United Kingdom in Mr. Assange’s case, UK domestic law on the determinative issues had been drastically changed, including as a result of perceived abuses raised by Sweden’s EAW, so that if

requested, Mr. Assange's extradition would not have been permitted by the UK. Nevertheless, the Government of the United Kingdom has stated in relation to Mr. Assange that these changes are "not retrospective" and so may not benefit him. A position is maintained in which his confinement within the Ecuadorian Embassy is likely to continue indefinitely. Neither Sweden nor the United Kingdom had seen it as their duty to proffer any other remedy than to allow the demand for extradition to continue unchanged.

The source further argued that the response of the Swedish Government asserted that Mr. Assange's confinement in the embassy was voluntary, and that "Swedish authorities have no control over his decision to stay at the embassy", that he is "free to leave the Ecuadorian embassy at any point in time" and that there is "no causal link" between the Swedish EAW and Mr. Assange's confinement. However, even the Swedish Prosecution Authority as recently as July 2014 described Mr. Assange's case in relation to its warrant against him as remaining "in custody" and Mr. Assange's being "still detained". With regard to the right to independent, rigorous and fair process, the source stated that beside that Mr. Assange had not yet been formally charged, contrary to the general statement of Sweden's response claiming that in Sweden, "[d]uring a preliminary investigation, a suspect is entitled to examine all the investigation material upon which the allegation is based," neither the Swedish court nor Mr. Assange had been granted access to hundreds of potentially exculpatory SMS messages, thereby violating Mr. Assange's right to effective judicial protection.

On 19 November 2014, the source submitted its comments to the responses of the Government of the United Kingdom of Great Britain. The source considered that the reply of the Swedish Government could not be read in isolation, since the actions (or inaction) of the two governments were in a number of respects interdependent. Sweden, as represented by the UK Crown Prosecution Service, was the party formally acting against Mr. Assange in the UK courts.

According to the source, in light of Sweden's concession that Mr. Assange's situation is "very tough", the Government of the United Kingdom of Great Britain seemed to forget that those seeking asylum and those who obtain it, like Mr. Assange, are hardly making a choice based on free will, but one based on escaping from persecution. Leaving the Embassy would force him to renounce his asylum and expose himself to a risk of persecution and cruel, inhuman treatment.

The source asserted that the response of the UK Government revealed its position to do nothing to stop Mr. Assange's indefinite detention despite the passage of time and its consequent impact upon Mr. Assange and his family. In its response, the United Kingdom made the same critical error as Sweden – it refused to honour its obligations to respect Mr. Assange's asylum under either the 1951 Refugee Convention, or customary international law.

Firstly, the response did not devote a single word concerning the United Kingdom's duty to afford mutual recognition to asylum decisions issued by other States within the Framework of the 1951 Convention. Secondly, the United Kingdom further claimed that Mr. Assange was not granted 'political' asylum but was instead granted asylum under the Caracas Convention, and that because the United Kingdom was not a party to the Caracas Convention, it has no obligation to recognise it. Sweden, the United Kingdom and Ecuador are parties to the 1951 Refugee Convention, which places on States an obligation to respect *non-refoulement* with no reservations.

The United Kingdom failed to acknowledge custom and its own practice of recognising diplomatic asylum. States have, under general international law, a right and a duty in certain cases to provide diplomatic asylum on humanitarian grounds. This is both the general practice of States and a general practice accepted by them as law (*opinio juris*), as set out in Article 38(1)(b) of the Statute of the International Court of Justice. Further, numerous countries, including the United Kingdom, had recognised diplomatic asylum in its practice. Famously, the United Kingdom was prepared to grant diplomatic asylum to a large number of persons in its Embassy in Tehran under the Shah. Lord McNair had summarised the UK practice in the following terms: "on humanitarian grounds [the UK] has frequently authorised its diplomatic and other officers to grant temporary asylum in cases of emergency". The source also asserted that, in its response, the United Kingdom suggested that Mr. Assange's extradition was deemed to be fair and proportionate by the UK Supreme Court. However, that decision predated the current ability of UK courts to consider proportionality in extradition cases. It was a complaint by the Supreme Court on exactly this point in relation to Mr. Assange that led to corrective legislation that came into force in 2014.

The corrective UK legislation addressed the court's inability to conduct a proportionality assessment of

the Swedish prosecutor's international arrest warrant (corrected by s. 157 of the Anti-Social Behaviour, Crime and Policing Act 2014, in force since July this year). The corrective legislation also barred extradition where no decision to bring a person to trial had been made (s. 156). The prosecutor in Sweden does not dispute that she had not yet made a decision to bring the case to trial, let alone charge Mr. Assange.

The source asserted that the legal basis for Mr. Assange's extradition has further eroded. The UK's response even rested its assertion on a Supreme Court decision which even the Supreme Court has distanced itself from. In the Bucnys case, the Supreme Court revisited its split decision in *Assange vs. Swedish Prosecution Authority* and explained that the single argument which had become the decisive point in Assange had been reached incorrectly.

Nevertheless, the corrective legislation in domestic UK law excluded any individual whose case had been already decided by the UK courts. Thus Mr. Assange was frozen out of a remedy, further contributing to his legally uncertain and precarious situation, without a willingness on the part of the United Kingdom to review the case given the subsequent circumstances (the granting of asylum), and with it, the principle of the retroactive application of the law which was favourable to the accused, in accordance with the jurisprudence of the ECtHR. The corrective legislation was passed to prevent arbitrary detention – to prevent people languishing in prison awaiting trial – but now the United Kingdom is not remedying the very case that led to it. The passage of the new legislation is an admission of previous unfairness and the very person abused by it is not getting its benefit.

The source also claimed that, in its response, the UK Government failed to recognise that Mr. Assange's chances of receiving an "independent, rigorous and fair process" had already been fatally and irreparably undermined. At a very minimum, the United Kingdom should have recognised that Mr. Assange had been denied a speedy investigation and the right to defend himself, and he had been kept under different forms of deprivation of liberty which amount to the arbitrary detention he was currently subjected to.

Additionally, Mr. Assange had been, from the beginning of the Swedish investigation, denied an "independent, rigorous and fair process". The source alleged that the United Kingdom completely failed to respond to the arguments that there was a lack of fair process and prejudice faced by Mr. Assange due to the fact that the existence of a confidential preliminary investigation against Mr. Assange had been unlawfully disclosed to a tabloid newspaper (*Expressen*) by the Swedish Prosecution Authority within hours of its commencement, which led to a perception that there is a formal accusation against Mr. Assange.

Finally, the source claimed that the United Kingdom did not address any of Mr. Assange's substantive rights or the wealth of authorities addressed in its complaint. The United Kingdom failed to recognise his right to asylum or to offer him safe passage. Mr. Assange faces ongoing indefinite detention and the serious compromise of his health and family life, which is a violation of numerous conventions to which the United Kingdom is a party. The UK Government's response proposed no relief and only served to reinforce the indefinite and arbitrary nature of Mr. Assange's confinement.

Discussion

The question that was posed to the Working Group is whether the current situation of Mr. Assange corresponds to any of the five categories of arbitrary detention applied by the Working Group in the consideration of the cases brought to its attention.

At the outset, the Working Group notes with concern that Mr. Assange has been subjected to different forms of deprivation of liberty ever since 7 December 2010 to this date as a result of both the actions and the inactions of the State of Sweden and the United Kingdom of Great Britain and Northern Ireland. Firstly, Mr. Assange was held in isolation in the Wandsworth prison in London for 10 days, from 7 December to 16 December 2010 and this was not challenged by any of the two Respondent States. In this regard, the Working Group expresses its concern that he was detained in isolation at the very beginning of the episode that lasted longer than 5 years. The arbitrariness is inherent in this form of deprivation of liberty, if the individual is left outside the cloak of legal protection, including the access to legal assistance (para. 60 of the Working Group's Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary law). Such a practice of law in general corresponds to the violations of both rules proscribing arbitrary detention and ensuring the right to a fair trial, as guaranteed by articles 9 and 10 of the UDHR and articles 7, 9(1), 9(3), 9(4), 10 and 14 of the ICCPR.

That initial deprivation of liberty then continued in the form of house arrest for some 550 days. This again was not contested by any of the two States. During this prolonged period of house arrest, Mr. Assange

had been subjected to various forms of harsh restrictions, including monitoring using an electric tag, an obligation to report to the police every day and a bar on being outside of his place of residence at night. In this regard, the Working Group has no choice but to query what has prohibited the unfolding of judicial management of any kind in a reasonable manner from occurring for such extended period of time. It is during that period that he has sought refuge at the Embassy of the Republic of Ecuador in London. Despite the fact that the Republic of Ecuador has granted him asylum in August 2012, his newly acquired status has not been recognized by neither Sweden nor the UK. Mr. Assange has been subjected to extensive surveillance by the British police during his stay at the Ecuadorian Embassy to this date. In view of the foregoing, the Working Group considers that, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), Mr. Assange has not been guaranteed the international norms of due process and the guarantees to a fair trial during these three different moments: the detention in isolation in Wandsworth Prison, the 550 days under house arrest, and the continuation of the deprivation of liberty in the Embassy of the Republic of Ecuador in London, United Kingdom.

The Working Group also views that Mr. Assange's stay at the Embassy of the Republic of Ecuador in London to this date should be considered as a prolongation of the already continued deprivation of liberty that had been conducted in breach of the principles of reasonableness, necessity and proportionality. The Working Group, in its Deliberation No. 9, had already confirmed its position on the definition of arbitrary detention. What matters in the expression 'arbitrary detention' is essentially the word "arbitrary", i.e., the elimination, in all its forms, of arbitrariness, whatever the phase of deprivation of liberty concerned (para. 56). Placing individuals in temporary custody in stations, ports and airports or *any other facilities* where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty (para. 59). The notion of "arbitrary" *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary (para. 61).

The Human Rights Committee, in its General Comment No. 35 on Article 9 also stated that "An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality." (para. 12, as was reiterated in para. 61 of the Deliberation No. 9 of the Working Group).

The Working Group is concerned that the only basis of the deprivation of liberty of Mr. Assange appears to be the European Arrest Warrant issued by the Swedish prosecution based on a criminal allegation. Until the date of the adoption of this Opinion, Mr. Assange has never been formally indicted in Sweden. The European Arrest Warrant was issued for the purpose of conducting preliminary investigation in order to determine whether it will lead to an indictment or not.

In its reply, the Swedish Government indicated that according to Swedish law, a suspect is entitled to examine all the investigation material upon which the allegation is based. The Working Group notes in this regard that Mr. Assange has not been granted access to any material of such which is in violation of article 14 of ICCPR.

At this point, it is noteworthy that the Working Group, while examining the essential safeguards for the prevention of torture, stressed that prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members (para. 58, the Deliberation No. 9). The right to personal security in article 9, paragraph 1 of the ICCPR, is relevant to the treatment of both detained and non-detained persons. The appropriateness of the conditions prevailing in detention to the purpose of detention is sometimes a factor in determining whether detention is arbitrary within the meaning of article 9 of the ICCPR. Certain conditions of detention (such as access to counsel and family) may result in procedural violations of paragraphs 3 and 4 of article 9 (para. 59, the Deliberation 9).

With regard to the application of the principle of proportionality, it is also worth mentioning that Lord Reed of the UK Supreme Court (*Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39, per Lord Reeds, para. 74) set out that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected rights; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without

unacceptably compromising the achievement of the objective; (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

The Working Group also views that there has been a substantial failure to exercise due diligence on the part of the concerned States with regard to the performance of the criminal administration, given the following factual elements: (1) in the case of Mr. Assange, after more than five years' of time lapse, he is still left even before the stage of preliminary investigation with no predictability as to whether and when a formal process of any judicial dealing would commence; (2) despite that it is left to the initial choice of the Swedish prosecution as to what mode of investigation would best suit the purpose of criminal justice, the exercise and implementation of the investigation method should be conducted in compliance with the rule of proportionality, including undertaking to explore alternative ways of administering justice; (3) unlike other suspects in general whose whereabouts are either unknown or unidentifiable and whose spirit of cooperation is non-existent, Mr. Assange, while staying under constant and highly intrusive surveillance, has continued to express his willingness to participate in the criminal investigation; (4) as a consequence, his situation now has become both excessive and unnecessary. From a time perspective, it is worse than if he had appeared in Sweden for questioning and possible legal proceeding when first summoned to do so; (5) irrespective of whether the grant of the asylum by the Republic of Ecuador to Mr. Assange should be acknowledged by the concerned States and whether the concerned States could have endorsed the decision and wish of the Republic of Ecuador, as they had previously done on the humanitarian grounds, the grant itself and the fear of persecution on the part of Mr. Assange based on the possibility of extradition, should have been given fuller consideration in the determination and the exercise of criminal administration, instead of being subjected to a sweeping judgment as defining either merely hypothetical or irrelevant; (6) it defeats the purpose and efficiency of justice and the interest of the concerned victims to put this matter of investigation to a state of indefinite procrastination .

The Working Group is convinced once again that, among others, the current situation of Mr. Assange staying within the confines of the Embassy of the Republic of Ecuador in London, United Kingdom, has become a state of an arbitrary deprivation of liberty. The factual elements and the totality of the circumstances that have led to this conclusion include the followings: (1) Mr. Assange has been denied the opportunity to provide a statement, which is a fundamental aspect of the *audi alteram partem* principle, the access to exculpatory evidence, and thus the opportunity to defend himself against the allegations; (2) the duration of such detention is *ipso facto* incompatible with the presumption of innocence. Mr. Assange has been denied the right to contest the continued necessity and proportionality of the arrest warrant in light of the length of this detention, i.e. his confinement in the Ecuadorian Embassy; (3) the indefinite nature of this detention, and the absence of an effective form of judicial review or remedy concerning the prolonged confinement and the highly intrusive surveillance, to which Mr. Assange has been subjected; (4) the Embassy of the Republic of Ecuador in London is not and far less than a house or detention centre equipped for prolonged pre-trial detention and lacks appropriate and necessary medical equipment or facilities. It is valid to assume, after 5 years of deprivation of liberty, Mr. Assange's health could have been deteriorated to a level that anything more than a superficial illness would put his health at a serious risk and he was denied his access to a medical institution for a proper diagnosis, including taking a MRI test; (5) with regard to the legality of the EAW, since the final decision by the Supreme Court of the United Kingdom in Mr. Assange's case, UK domestic law on the determinative issues had been drastically changed, including as a result of perceived abuses raised by Sweden's EAW, so that if requested, Mr. Assange's extradition would not have been permitted by the UK. Nevertheless, the Government of the United Kingdom has stated in relation to Mr. Assange that these changes are "not retrospective" and so may not benefit him. A position is maintained in which his confinement within the Ecuadorian Embassy is likely to continue indefinitely. The corrective UK legislation addressed the court's inability to conduct a proportionality assessment of the Swedish prosecutor's international arrest warrant (corrected by s. 157 of the Anti-Social Behaviour, Crime and Policing Act 2014, in force since July 2014). The corrective legislation also barred extradition where no decision to bring a person to trial had been made (s. 156).

Disposition

In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Assange is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 7, 9(1), 9(3),

9(4), 10 and 14 of the International Covenant on Civil and Political Rights. It falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

Consequent upon the opinion rendered, the Working Group requests the Government of Sweden and the Government of the United Kingdom of Great Britain and Northern Ireland to assess the situation of Mr. Assange, to ensure his safety and physical integrity, to facilitate the exercise of his right to freedom of movement in an expedient manner, and to ensure the full enjoyment of his rights guaranteed by the international norms on detention.

The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to ensure the right of free movement of Mr. Assange and accord him an enforceable right to compensation, in accordance with article 9(5) of the International Covenant on Civil and Political Rights.

[Adopted on 4 December 2015]

Appendix I

Individual dissenting opinion of WGAD member Vladimir Tochilovsky

- . The adopted Opinion raises serious question as to the scope of the mandate of the Working Group.
- 0. It is assumed in the Opinion that Mr. Assange has been detained in the Embassy of Ecuador in London by the authorities of the United Kingdom. In particular, it is stated that his stay in the Embassy constitutes “a state of an arbitrary deprivation of liberty.”
- 0. In fact, Mr. Assange fled the bail in June 2012 and since then stays at the premises of the Embassy using them as a safe haven to evade arrest. Indeed, fugitives are often self-confined within the places where they evade arrest and detention. This could be some premises, as in Mr. Assange’s situation, or the territory of the State that does not recognise the arrest warrant. However, these territories and premises of self-confinement cannot be considered as places of detention for the purposes of the mandate of the Working Group.
- 0. In regard to the house arrest of Mr. Assange in 2011-2012, it was previously emphasised by the Working Group that where the person is allowed to leave the residence (as in Mr. Assange’s case), it is “a form of restriction of liberty rather than deprivation of liberty, measure which would then lie *outside the Group’s competence*” (E/CN.4/1998/44, para. 41(e)). Mr. Assange was allowed to leave the mansion where he was supposed to reside while litigating against extradition in the courts of the United Kingdom. As soon as his last application was dismissed by the Supreme Court in June 2012, Mr. Assange fled the bail.
- 0. The mandate of the Working Group is not without limits. By definition, the Working Group is not competent to consider situations that do not involve deprivation of liberty. For the same reason, issues related to the fugitives’ self-confinement, such as asylum and extradition, do not fall into the mandate of the Working Group (see, for instance, E/CN.4/1999/63, para. 67).
- 0. That is not to say that the complaints of Mr. Assange could not have been considered. There exist the *appropriate* UN human rights treaty bodies and the European Court of Human Rights that do have mandate to examine such complaints regardless whether they involve deprivation of liberty or not.
- 0. Incidentally, any further application of Mr. Assange may now be declared inadmissible in an appropriate UN body or ECtHR on the matters that have been considered by the Working Group. In this regard, one may refer to the ECtHR decision in *Peraldi v. France* (2096/05) and the reservation of Sweden to the First Optional Protocol to the ICCPR.
- 0. For these reasons, I dissent.

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